

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: March 10, 2005

Opposition No. 91161603

Allergan, Inc.

v.

BioCentric Laboratories,
Inc.

Cindy B. Greenbaum, Attorney:

The Board instituted this proceeding on August 5, 2004, making applicant's answer due by September 14, 2004.

Inasmuch as applicant did not file an answer or other response by the due date, the October 27, 2004 Board order allowed applicant time to show cause why judgment should not be entered against it in accordance with Fed. R. Civ. P. 55(b).

Applicant's November 8, 2004 response to the show cause order included a copy of applicant's September 2, 2004 request to extend until December 1, 2004 applicant's time to file a notice of opposition.¹ The Board granted said

¹Applicant's November 8, 2004 response and December 1, 2004 answer do not indicate proof of service of a copy thereof on counsel for opposer, as discussed hereinbelow. The Board may not consider future papers filed by applicant which do not indicate proof of service thereof on counsel for opposer. The Board is aware that opposer has been informed of the November 8, 2004 and December 1, 2004 filings; thus, the Board will not forward a copy of the noted filings to counsel for opposer. If opposer has not already done so, opposer may print out a copy of these

request, even though the request was inapposite to the instant proceeding. In fact, applicant should have filed a motion to extend its time to file an answer to the notice of opposition. Notwithstanding applicant's procedural error in requesting an extension of time, applicant did, in fact, file an answer on December 1, 2004.

Whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: "for good cause shown the court may set aside an entry of default." As a general rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. See *Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991).

In this case, the Board finds that opposer is not prejudiced by applicant's late filing and, by filing an answer which denies the fundamental allegations in the notice of opposition, applicant has asserted a meritorious defense to this action. However, applicant has offered no explanation as to why it failed to timely file its answer. In view of the foregoing, applicant is allowed until **THIRTY DAYS** from the mailing date of this order to explain why its answer was filed late.

PRO SE INFORMATION

Applicant is reminded that it will be expected to comply with all applicable rules and Board practices during the remainder of this case. The Trademark Rules of Practice, other federal regulations governing practice before the Patent and Trademark Office, and many of the Federal Rules of Civil Procedure govern the conduct of this cancellation proceeding. Applicant should note that Patent and Trademark Rule 10.14 permits any person or legal entity to represent itself in a Board proceeding, though it is generally advisable for those unfamiliar with the applicable rules to secure the services of an attorney familiar with such matters.

SOURCES OF RELEVANT INFORMATION

If applicant does not retain counsel, then applicant will have to familiarize itself with the rules governing this proceeding. The Trademark Rules are codified in part two of Title 37 of the Code of Federal Regulations (also referred to as the CFR). The CFR and the Federal Rules of Civil Procedure, are likely to be found at most law libraries, and may be available at some public libraries. Finally, the Board's manual of procedure will be helpful.

On the World Wide Web, respondent may access most of these materials by logging onto <http://www.uspto.gov> and making the connection to trademark materials.

OBSERVATIONS REGARDING SPECIFIC RULES

One rule that applicant must pay particular attention to is Trademark Rule 2.119. That rule requires a party filing any paper with the Board during the course of a proceeding to serve a copy on its adversary, unless the adversary is represented by counsel, in which case, the copy must be served on the adversary's counsel. With the paper that it filed with the Board, the party filing the paper must include "proof of service" of the copy. "Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served; (2) the method of service (e.g., first class mail); (3) the person being served and the address used to effect service; and (4) the date of service.

Also, applicant should note that any paper it is required to file herein must be received by the Patent and Trademark Office by the due date, unless one of the filing procedures set forth in Trademark Rules 2.197 and 2.198 is utilized. These rules are in part two of Title 37 of the previously discussed Code of Federal Regulations.

RECENT TTAB DEVELOPMENTS

Files of TTAB proceedings can now be examined using TTAB Vue, accessible at <http://ttabvue.uspto.gov>. After entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format. Papers filed prior to January 2003 may not have been scanned. Unscanned papers remain available for public

access at the TTAB. For further information on file access, call the TTAB at 571-272-8500.

Parties should also be aware of recent changes in the rules affecting trademark matters, including the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003) (www.uspto.gov/web/offices/com/sol/notices/68fr55748.pdf); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003) (www.uspto.gov/web/offices/com/sol/notices/68fr48286.pdf).

The first revision of the second edition (March 2004) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at www.uspto.gov/web/offices/dcom/ttab/tbmp/.

DATES RESET

In view of the Board's delay in acting on this matter, trial dates, including the close of discovery, are reset as follows:

DISCOVERY PERIOD TO CLOSE:

June 15, 2005

Thirty-day testimony period for party in position of plaintiff to close: **September 13, 2005**

Thirty-day testimony period for party in position of defendant to close: **November 12, 2005**

Fifteen-day rebuttal testimony period to close:

December 27, 2005

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.